UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PETER ALAN OSGOOD, JR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No 03-273-P-H***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal is based on the plaintiff's functional illiteracy. Specifically, the plaintiff contends that the administrative law judge failed to analyze his learning disability using the required procedure, failed to make a particularized inquiry about the mental demands of his past relevant work, failed to fully develop the record with respect to his learning disability and adopted improper testimony from a vocational expert because functional illiteracy makes an individual unemployable under the Dictionary of Occupational Titles. I recommend that the court affirm the commissioner's decision.

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on August 20, 2004., pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had degenerative disc disease and a learning disorder, impairments that were severe but which did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings'), Finding 3, Record at 17; that he lacked the residual functional capacity to lift and carry more than 50 pounds occasionally or more than 25 pounds on a regular basis, to climb, stoop, kneel, crouch or crawl more than occasionally, to tolerate concentrated exposure to vibration, or to do work which requires the ability to read and write, Finding 5, *id*.; that in his past relevant work as a landscaper/groundskeeper the plaintiff was not required to lift more than 50 pounds or perform any other tasks which were not within his residual functional capacity and that his impairments therefore did not prevent him from performing his past relevant work, Findings 6-7, *id*.; and that he accordingly had not been under a disability, as that term is defined in the Social Security Act, at any time through the date of the decision, Finding 8, *id*. at 18. The Appeals Council declined to review the decision, *id*. at 5-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination made must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative judge reached Step 4 of the sequential review process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the commissioner must make findings of the plaintiff's residual functional capacity and the physical and mental demands of past work and determine whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* Rulings 1975-1982, at 813.

Discussion

The plaintiff states in his written submission to this court that "[t]he sole issue on appeal arises from the Plaintiff's learning disorder." Plaintiff's Itemized Statement of Errors (Docket No. 5) at 2. At oral argument, his attorney stated that the appeal raises three issues, including a failure to comply with 20 C.F.R. §§ 404.1520a and 416.920a at Step 2, a failure to make a particularized inquiry into the mental demands of the plaintiff's past relevant work and a failure to order a consultative psychological examination. It is not necessary to reach any of these claims. The administrative law judge found that the plaintiff had not engaged in substantial gainful activity since June 5, 2000, Record at 17, the date on which he alleged that his inability to work began, *id*. at 13. The only evidence in the record concerning his learning disability is the report of Michael F. Smyth, Ph.D., a licensed psychologist who evaluated the plaintiff on February 20, 1995, *id*. at 172-74, and the testimony of a psychologist who was serving as a medical advisor at the hearing, *id*. at 63-70.

The administrative law judge noted that the plaintiff's "learning disorder did not prevent him from engaging in substantial gainful activity from 1989 through 2000." *Id*. at 14. The plaintiff's past relevant work as a landscaper/groundskeeper, *id*. at 17, occurred during this period, *id*. at 143-50. The learning

disability upon which the plaintiff bases this appeal has existed at least since 1995, *id*. at 172-74, and he has offered no evidence that it has increased in severity since that time. The plaintiff performed his past relevant work while suffering from this learning disability. He cannot be incapable of returning to his past relevant work due to a limitation that was present while he performed that work. Under these circumstances, the plaintiff cannot possibly meet his burden to show that he cannot return to his former employment because of his learning disability. *See Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991) ("Where the claimant can still perform the demands and duties of a former job as []he actually performed it, a finding of non-disability is appropriate. . . . If, assuming the existence of the limitations as []he describes them, []he nonetheless appears to still possess the ability to do that past work, [][he is obviously not disabled."); *Leavitt v. Apfel*, 69 Soc.Sec.Rep.Serv. 760, 1999 WL 33117107 (D. Me. May 12, 1999) at *2. Accordingly, it is not necessary to consider any of the plaintiff's allegations of specific errors by the administrative law judge in evaluating either his learning disability or the requirements of his past relevant work.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of August, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

PETER A OSGOOD, JR

represented by **MURROUGH H. O'BRIEN**
P. O. BOX 370
PORTLAND, ME 04112
774-4130
Email: Mob1560148@aol.com

V.

Defendant

SOCIAL SECURITY ADMINISTRATION COMMISSIONER

represented by **THOMAS D. RAMSEY**
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002
617/565-4277
Email: thomas.ramsey@ssa.gov